Guidance for FLAGS arbitrators- decisions relating to children (updated November 2021)

FLAGS arbitrators must decide disputes "in accordance with the principles of Scots law" FLAGS Rules, Rule 47(1).

Section 11 of the Children (Scotland) Act 1995 ("the 1995 Act") governs applications made by parents or other family members involved in the care of a child for residence, contact or specific issue orders.

The statutory test for making orders is set out in section 11(7) of the 1995 Act. The obligations on the court apply equally to arbitrators:

(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

> *(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and*
>
> *(b) taking account of the child's age and maturity, shall so far as practicable—*
>
> > *(i) give him an opportunity to indicate whether he wishes to express his views;*
> >
> > *(ii) if he does so wish, give him an opportunity to express them; and*
> >
> > *(iii) have regard to such views as he may express.*

The court (or arbitrator) must also consider the need to protect the child from domestic abuse in terms of section 11(7A) and the extent to which the parties would have to co-operate with each other as respects matters affecting the child as a result of any order made in terms of section 11(7B) of the Act.

The Children (Scotland) Act 2020 ("the 2020 Act") and the incorporation of the UNCRC into Scots law bring about a cultural change in the approach of the courts to giving children the opportunity to form and express views, and to participate effectively in actions which relate to them. As arbitrators the coming into force of the 2020 Act will also change your practice.

Section 11(10) of the 1995 Act currently provides that, without prejudice to the generality of section 11(7)(b), a child of 12 years or more is deemed to be of sufficient age and maturity to form a view. Despite this provision, the general direction of travel in case law under the 1995 Act has been to consider obtaining and having regard to the views of much younger children. However, this is a sensitive and challenging area of family law.

Under the 1995 Act the court's approach is one of "practicability" - *Shields v Shields* 2002 SC 342.

The recent Sheriff Appeal Court decision in the case of LRK v AG [2021] SAC (Civ) 1 considered the issue of obtaining a seven year old child's views and held that firstly, the fact that the child's parents both asserted that there was no need to obtain her views did not discharge the court's obligation to do so and secondly, that the court's discretion to conclude that it was impracticable to obtain a child's views should be exercised with care and only in circumstances whether the overriding duty to consider the child's best interests as the paramount consideration mitigated against it.

It is worth noting that the sheriff appeal court approved the decision in Stewart v Stewart 2007 SC 451 regarding the impracticability of a child under three being able to form and express a view.

When the relevant provisions of the 2020 Act come into force, the presumption that a child of 12 years or more is deemed to be sufficient age and maturity to form a view will be removed. The new provision in terms of section 11ZB provides:

Regard to be had to the child's views

(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must—

(a) give the child concerned an opportunity to express the child's views in—

(i) the manner that the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference, and

(b) have regard to any views expressed by the child, taking into account the child's age and maturity.

(2) But the court is not required to comply with subsection (1) if satisfied that—

(a) the child is not capable of forming a view, or

(b) the location of the child is not known.

(3) The child is to be presumed to be capable of forming a view unless the contrary is shown.

(4) Nothing in this section requires a child to be legally represented in any proceedings in which the child's views are sought, if the child does not wish to be.".

Age alone, except in relation to infants, is no longer the determining factor in assessing a child's capacity.

In long running cases a child may need to be given the opportunity to express a view more than once.

A child's views are to be taken in the manner preferred by, or most suitable for, the child concerned.

What is required of arbitrators is to give the child an opportunity to express a view. Children may prefer not to be put in the middle of a dispute between their parents. By obtaining a child's views there can be a concern that the arbitrator will set an expectation that this will be determinative of the issue. It is important to emphasise that the child's views are only one element of your decision. This should be explained to the child, no matter what method of seeking their views is adopted.

Sometimes the issues in the case will not be assisted by obtaining the child's views; such where there is concern about serious domestic abuse, parental drug or alcohol abuse or mental health issues which are barriers to safe contact. These cases are less likely to arise in arbitration. However, there are a number of scenarios where a child's views and their best interests may not coincide.

In the 2006 case of In re D (a child) Baroness Hale commented*, "As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen*

to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

The weight to be given to a child's views will be specific to the facts and circumstances of a particular case. Where child's welfare cannot be reconciled with their wishes, the welfare principle will take precedence as the paramount consideration for the court (or arbitration). However, where the child's wishes can be given effect to in a way which is consistent with their best interests, then this approach should be adopted.

Practicalities of how and when a child's views are sought/obtained in an arbitration:

Timing is the first consideration. It is important to wait until the issues upon which the child's views may be sought are clear. Once the agreement to arbitrate is signed, a case management hearing will ordinarily be fixed and at that stage the questions or issues upon which the child may be given an opportunity to express a view will be focussed. It is suggested that parents (not just their agents) should participate in that hearing and that it is made clear to them that now that their dispute has been referred to arbitration, that their opinion about whether their child should be given an opportunity to express views is not determinative of the issue.

As arbitrator you should invite submissions from, and have a discussion with, the parties about whether they think that their child is capable of forming a view and

if so, to explore with them what they think their child's preferred means/the most suitable means of doing so might be. Formulating the questions/issues to be explored with the child should also be done at this stage and ideally, should be agreed between the parties. It should also be made clear that as arbitrator you will give appropriate weight to the child's views, but that they will not necessarily be determinative of the issue.

It is important to carefully consider the different means of giving the child an opportunity to express views and to ensure that any conversation which parents have with their child about this is carefully managed.

There are various options open to the arbitrator;

- writing to the child with a bespoke form F9 / letter in terms approved by the parties, perhaps, providing that a neutral adult such a school guidance teacher, supports the child to identify whether they wish to express a view and, if so, help them to complete the form.
- Some schools offer counselling services and organisations such as Relationships Scotland can offer supports for children in formulating and expressing their views.
- Section 21 of the 2020 Act requires the Scottish Ministers to set up child advocacy services which may be helpful in this context.
- Appointing an independent solicitor/ child welfare reporter to speak to the child and report back to the arbitration by way of a report confined to the issue of the child's views and where appropriate, commenting on the child's capacity and maturity, the context in which their views were formed and whether it is suspected that any influences were brought to bear on the child, is another option.

- In more complex cases, appointing a child psychologist, again ideally on an agreed remit, may be the best way forward.
- In some cases, as arbitrator, you might decide to speak to the child yourself. If you do decide to do this, then plan carefully how and when this will done, who will bring the child to see you, who will be with you when you speak to them and how will you record and feedback what is said? You should consider carefully whether there any possibility that this course might affect your impartiality in dealing with the case thereafter.

Ideally a consensus can be reached regarding the best way forward but if the parties do not agree how to proceed, then as arbitrator, you should issue a direction under Rule 31, clearly specifying the appropriate steps you are taking regarding meeting your obligations to give the child an opportunity express a view. If ordering a report, you should clearly define the remit (eg. is it confined to giving the child an opportunity to say whether they wish to express a view and if so eliciting and reporting back on child's views, or are there also underlying issues about the context in which those views may have been be formed that are to be addressed? Should the relevant professional comment on the child's capacity/maturity etc?). Your direction should also specify the liability for the expenses of the report, the timeframe and the arrangements for it to be lodged and shared with the parties. A continued case management hearing should be fixed to coincide with the availability of the report (allowing an appropriate time interval for agents to take instructions).

It should be noted that if information is disclosed by a child during the course of an arbitration which would lead a concern on the part of the arbitrator from a

child protection perspective, then this would fall within the confidentiality exceptions in Rule 26.

Explaining decisions to children

Section 20 of the 2020 Act will add in section 11F to the 1995 Act, imposing a duty on the court in certain circumstances to explain various decisions to the child affected by them in respect of some section 11 orders. Arbitrators must ensure that their decision is explained to the child in a way the child can understand. This is not required where the child would be incapable of understanding the explanation or where it is not in the child's best interests for this to done. If you decide that your decision should be explained to child the this can be done in form of a child-centred judgement (Lancashire County Council v Mr A and others [2016] EWFC 9 – a great example of a simplified judgement written to enable it to be understood by a mother with learning difficulties and a child – and much harder to do than you might think)) a letter to the child (Re A (letter to a Young Person) [2017] EWFC 48; Patrick v Patrick [2017] Glasgow Sh Ct 46) or by appointing an appropriate professional such as a child welfare reporter or child advocacy worker to speak to the child. This task should not be delegated to the parents.

Edinburgh November 2021